Supreme Court Cause No. DA 09-0500

IN THE SUPREME COURT OF THE STATE OF MONTANA

LON PETERSON,
Appellant/Cross-Appellee,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Appellee/Cross-Appellant,

APPELLEE/CROSS-APPELLANT, ST. PAUL FIRE & MARINE INSURANCE COMPANY'S ANSWER TO APPELLANT'S OPENING BRIEF AND BRIEF SUPPRORTING CROSS APPEAL

On Appeal from the Montana Eighth Judicial District Court, Cascade County

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APPEARANCES:

Alexander (Zander) Blewett, III
Kurt M. Jackson
HOYT & BLEWETT PLLC
501 Second Avenue North
P.O. Box 2807
Great Falls, MT 59403
Telephone: (406) 761-1960
Facsimile: (406) 761-7186
h&b@hoytandblewett.com
Attorneys for Plaintiff/Appellant and Cross-Appellee

Guy W. Rogers
Matthew I. Tourtlotte
BROWN LAW FIRM, P.C.
315 North 24th Street
P.O. Box 849
Billings, MT 59103
Telephone: (406) 248-2611
Facsimile: (406) 248-3128
grogers@brownfirm.com
mtourtlotte@brownfirm.com
Attorneys for Defendant/Appellee and Cross-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Other Authorities

ST. PAUL'S STATEMENT OF THE CASE:

The accident at issue occurred on June 15, 2004, along a rural gravel road outside of Cut Bank Montana. The Parties involved were Lon Peterson and Michael Lindberg, an employee of Omimex Resources. (CR,2)[1]. Omimex was insured by St. Paul. (TR 1:102; D's Ex. 603.85-603.86). Peterson asserted a claim for advance payment of his medical expenses. Based upon the contested liability facts, St. Paul concluded liability for the accident was not reasonably clear. Peterson's claim was denied. (D's Ex. 501.47; TR2: 483-484)[2]. He filed a lawsuit against Omimex, asserting Lindberg's negligence.

St. Paul hired William Gregoire to defend Omimex. (TR3: 680-681). Liability was contested by Gregoire up to the time the case settled in June of 2007. (TR4: 897-898). After settling his case against Omimex, Appellant (Peterson) filed a third party "bad-faith" claim against St. Paul, asserting it had violated its obligation to advance pay his medical expenses pursuant to *Ridley v. Guarantee National Ins. Co.* , 951 P2d 987. He also asserted claims under Montana's Unfair Trade Practices Act (UTPA), MCA § 33-18-201(4) and (6).

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[1] 'CR' refers to the District Court Clerk's Case Register Report; 'TR:' refers to the transcript, volume, and relevant page number.

[2] See, Excerpt TR2: 483-484 and D's Ex. 501.47, Attached as Exhibit A.

The "bad faith" case was tried before a Cascade County jury. The jury found in favor of St. Paul, finding it did not act unreasonably and it did not violate Montana's Unfair Trade Practices Act because liability for the underlying accident was not reasonably clear. (CR 135).

STATEMENT OF THE FACTS:

I. THE ACCIDENT:

The accident between Peterson and Lindberg occurred at the crest of a blind hill on a rural gravel road. At the time of the accident Lindberg was traveling to meet a coworker. He was driving at about 45 mph. (TR4: 857). Lon Peterson was traveling at about 30 mph or more. (TR4: 883). Before Lindberg approached the hill he steered his truck toward the right shoulder as far as he could go. (D's Ex. 508.7). Lindberg has always maintained he was not at fault for the accident. He has repeatedly testified he was over upon the right shoulder as far as he could go. Lindberg believes Peterson was driving on the wrong side of the road. (TR4: 829; D's Ex. 508.7, 508.10).

Both Peterson and Lindberg were injured in the accident. (TR 4:816; CR 2). Peterson suffered an injured left knee and a severely fractured hip. (TR1: 182-183). Lindberg suffered injuries to his right and left thumbs and also to his wrist. (D's Ex. 572.43-572.44; D's Ex. 559.22-559.37; TR 4: 879, 926).

II. ST. PAUL'S INVESTIGATION:

Shortly after the accident, Peterson filed a claim against Omimex. The claim was received by St. Paul, on or about, June 17, 2004. (D's Ex. 501.61). The Peterson claim was assigned to St. Paul's claims adjuster, Richard Allums. Allums began his investigation of the Peterson claim on or about June 21, 2004. (TR 2: 454). Allums immediately attempted to contact Lindberg and Peterson. (TR2: 455). During his initial conversations with Lindberg, Allums asked if any citations had been issued. Lindberg said 'no'. (TR2: 455-456). During trial, Lindberg testified that the investigating officer decided not to issue him a citation for cell phone use, once he learned both of his hands were on the steering wheel. (TR4: 825).

After speaking with Lindberg, Allums went to the Montana Highway Patrol office. He obtained a copy of the police report. The report indicated 'cell phone use' as a contributing cause for the accident. (TR2: 456). Allums noted the alleged 'cell phone use' issue in his investigative notes. He also noted Lindberg denied he was using or reaching for a cell phone at the time of the accident. (TR2:456-457; D's Ex. 501.59).

On June 29th, 2004, Allums met with Officer Sons. Allums asked the officer about traffic citations. Officer Sons informed Allums no citations had been issued to Lindberg or Peterson. Allums also learned the posted speed limit was 70 mph.

(TR2: 459). Officer Sons felt both drivers may have been at fault for the accident. *Id.* Allums noted his conversation with Officer Sons in the claim notes.

On July 1st, 2004, Allums took recorded statements from both Lindberg and Peterson. (TR2: 459). Lindberg explained in his statement that he was not in a hurry, he was traveling at about 45 mph, his truck was over to the right as far as it could go, and his attention was focused upon the roadway as he crested the hill. (D's Ex. 508.6-508.8; CR 128.3:41, TR4: 829). Allums traveled to the accident scene with Lindberg. At the scene, Lindberg positioned an exemplar vehicle on the shoulder of the road, indicating his position on the road at the time of the accident. (TR2: 459; D's Ex. 505.5-505.7). After taking the statements and completing his investigation of the scene, it was clear to Allums both witnesses believed the other driver had caused the accident. (TR2: 467; D's Ex. 508.10).

Allums completed his initial investigation on or about July 1, 2004. Allums determined there was a dispute between Peterson and Lindberg as to who was at fault for the accident. (TR2: 429, 445). During his trial testimony, Allums explained to the jury how both witnesses were claiming the other driver had caused the accident and there were no other eye witnesses. (D's Ex 501.57; TR2: 470-471). Accordingly, Allums' initial liability recommendation was St. Paul obtain the assistance of an accident re-constructionist or that St. Paul attempt to settle the Peterson claim by accepting 50% of the liability. *Id.*

Shortly after Allums' initial recommendation, St. Paul hired accident reconstructionist Dr. F. Denman Lee to investigate and reconstruct the accident. (D's Ex. 504.1). Dr. Lee's analysis of the accident scene, together with the investigating officer's photographs and field notes, placed Peterson's vehicle approximately two feet over the mid-point of the road[3]. (*Id.*). Based upon Dr. Lee's findings, St. Paul attributed 80%-90% of the liability for the accident to Peterson. (D's Ex. 501.47; TR2: 483-584)[4]. Accordingly, St. Paul denied Peterson's claims for advance payment of his medical expenses. (D's Ex. 501.48, 516; TR2: 485-486).

III. GREGOIRE'S DEFENSE, *PETERSON V. OMIMEX*:

Peterson filed a lawsuit against Omimex, in Montana's U.S. District Court, Great Falls Division, styled as, *Peterson v. Omimex*, Cause No. CV-59-GF-SEH. St. Paul hired William Gregoire to defend Omimex in the lawsuit. (TR3: 680-681).

A. GREGOIRE CONTROLLED THE UNDERLYING DEFENSE:

After Peterson filed the underlying personal injury lawsuit, the claim was

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[3] Peterson's counsel asserted during trial that Dr. Lee came to four different conclusions. This assertion was misleading. Peterson's own expert, C. Richard Anderson, admitted on cross examination that Dr. Lee could not finalize his report without the information he had requested from the M.H.P. (TR2: 379). It was an abuse of discretion for the trial court to preclude Dr. Lee from testifying at trial.

[4] See, Exhibit A.

transferred within St. Paul from Allums to Dale Reed. Reed reviewed the file and Allums' liability analysis. He agreed with the apportionment of 80%-90% of the fault to Peterson. (TR3: 676). Reed noted in his file he had contacted the insured, Omimex, about using William Gregoire, from Great Falls, Montana, to defend the claim. The insured had no objection to using Gregoire. (D's Ex. 501.43).

Gregoire was in total control of the defense of Omimex throughout his handling of the claim. (TR4:846-847). Both Gregoire and Dale Reed explained to the jury St. Paul had no authority to control any aspect of the defense provided by Gregoire. (TR3: 680-681; TR4: 846). Peterson presented no evidence to the jury establishing Gregorie was acting as St. Paul's agent.

B. GREGOIRE REPORTED LIABILITY WAS CONTESTED:

Throughout the pendency of the underlying *Peterson v. Omimex* personal injury lawsuit, Gregoire always reported liability was disputed. Accordingly, he recommended to St. Paul on several occasions that Peterson's requests for advance payment of his medical expenses should be denied. (TR4: 874-875; D's Ex. 528.4). During his trial testimony, Gregoire explained to the jury that based purely upon the objective facts, he had a good chance of obtaining a defense verdict on behalf of Omimex. (TR4: 875; 897-898)[5].

According to Gregoire, Lindberg's alleged cell phone use/distraction was

[5] See, Excerpts of Gregoire's Trial Testimony, TR4, Attached as Exhibit B.

legitimately disputed and a 'non-issue' in the underlying case. (TR4: 855). Gregoire pointed out to the jury the fact that there was no cell phone service at the accident scene. (TR4:854). He explained that Lindberg's cell phone records revealed no calls were placed or received by Lindberg at the time of the accident. (TR4: 856). Gregoire testified that, according to his expert witness in the underlying case, Lindberg's hand and wrist injuries were consistent with him having had both hands upon the steering wheel. (TR4: 855; D's Ex. 501.38). Gregoire's reports to St. Paul likewise indicated no citations were issued to Lindberg because his hands were on the steering wheel. (D's Ex. 501.38; TR:4 832-833; 854-856). In contrast, the only evidence developed in the underlying personal injury case in support of Peterson's theory regarding the 'cell phone issue' was the single indication of cell phone use in Officer Son's police report[6]. (P's Ex. 1). Peterson offered no evidence to the jury suggesting that the issue of Lindberg's alleged cell phone was not legitimately disputed in the underlying personal injury case.

Gregoire also testified about Lindberg's and Peterson's respective speeds and road positions at the time of the accident. He explained to the jury that most

[6] In an effort to explain the discrepancy between his unqualified denial of using or being distracted by his cell phone and the indication of 'cell phone use' set forth in the accident report, Lindberg explained in his deposition that he may not have spoken clearly on the issue because he had just been in a horrible roll-over accident. (D's Ex. 572.73).

everyone he'd interviewed during his investigation and work-up of the underlying case, agreed 45 miles per hour was a reasonable rate of speed for Lindberg to have been traveling. (TR4: 884). Gregoire also explained to the jury that his liability expert, Dr. Lee, had determined Peterson was more than two feet over the midpoint of the road at the time of the accident and was likely traveling at rate of speed greater than 30 mph[7]. (TR4: 871).

In sum, the evidence presented to the jury during the bad faith trial fairly established St. Paul had performed a reasonable investigation regarding the issues Peterson alleged as contributing factors to the accident: speed, driver distraction, and road position. The evidence supported the jury's finding that each of these issues were disputed and legitimately contested up until the underlying case settled. (TR2: 466, 482; TR4: 857, 882-885; 917; D's Ex. 559.8).

C. GREGOIRE'S RISK ASSESSMENTS:

During his trial testimony, Gregoire was asked to explain to the jury how he could perceive liability as being in dispute, and yet report to St. Paul **the possibility** that liability could be apportioned between Peterson and Omimex on a 50/50, or even a 70/30 basis. Gregoire testified that while his risk assessments were expressed in percentages of negligence, he certainly was not attributing negligent

[7] Gregoire explained to the jury how he had reported to St. Paul the fact that Peterson's speedometer was stuck at 30 mph after the wreck. (TR4:883).

acts to Lindberg:

> *...[D]on't be using those percentages as being absolute 50. I mean, how can I call 50, 51, 55, I mean, nobody has a crystal ball like that... But am I saying that Mr. Lindberg was 50 percent negligent in this? No, that's not true.* ***I do not believe that for a minute...***[8]

He further explained that even though he believed Lindberg was less than fifty percent negligent in causing the accident, his subjective assessment was a jury might award Peterson damages based upon the sympathy factor and the serious nature of his injures:

> ***[I]f you look at the acts in this case, the objective acts, actions of the parties, I thought liability was not reasonably clear****, I thought* ***we had a good case to defend****. But when you throw in the sympathy factor in this case, I mean, Mr. Peterson was severely injured, and then he fell and was severely injured again, ... there was going to be testimony going to the jury, there was going to be hip replacements, knee replacements.* ***My question was: Can I get a jury to get over that sympathy factor and look at the negligent acts.*** *That's so difficult to do when you're dealing with severe injuries...*[9]

Gregoire testified that because of the subjective issues surrounding the underlying case, he thought the case should be settled if it could be settled for a reasonable amount. (TR4: 895, 897; D's Ex. 501.8). However, Gregoire consistently testified to the jury that despite the growing damages in the underlying case, the case remained defensible on the issue of liability: "***from the objective evidence... this***

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[8] See, Exhibit B, Gregoire testimony, TR4: 917-918.

[9] See, Exhibit B, Gregoire testimony, TR4: 914-915.

could be -- could go as a complete defense verdict". *(TR4:891).*

D. SETTLEMENT OF THE *PETERSON V. OMIMEX* LITIGATION:

Like most contested liability cases, the *Peterson v. Omimex* case settled prior to trial. In advance of formal mediation, Gregoire received a settlement demand from Peterson's counsel in the amount of $1.8 million dollars. (D's Ex. 501.3c). When the claim did not settle at the mediation, Gregoire continued to work toward settling the case. (D's Ex. 501.3a). In April of 2007, post mediation, St. Paul authorized Gregoire to extend an $850,000.00 settlement offer to Peterson's counsel. *Id.* The offer was initially rejected. (CR 129.20, pp. 11- 12)[10]. Later however, Peterson's counsel contacted Gregoire and suggested that if the $850,000.00 settlement offer were extended in the form of an offer of judgment, Peterson would accept the offer. *Id.* Gregoire extended the settlement offer in the form requested by Peterson's counsel and the case settled. (D's Ex. 501.2; 501.3a).

E. PETERSON'S 'BAD FAITH' CLAIM:

After settling the underlying case, Peterson filed the subject bad faith claims against St. Paul, asserting it had violated sections 33-18-201(4) and (6) of the UTPA. (CR1). St. Paul immediately moved for summary judgment and dismissal of the Peterson claims. St. Paul argued that because there could be no legitimate dispute as to the contested nature of the underlying liability facts surrounding the

[10] See, Excerpt from CR 129.20, Deposition of Dale Reed, pp. 1, 11-12, Attached as Exhibit C.

accident, it was entitled to summary judgment pursuant to the Court's decision in *Giambra v. Travelers Indem. Co.*, 2003 MT 289, 78 P.3d 880 and pursuant to MCA § 33-18-242(5). (CR 11; 56; 77). The Court denied St. Paul's motions, holding that the issue of whether or not there were genuine disputed facts regarding negligence and liability regarding the accident, was a question for the jury to decide. (CR 39). The matter proceeded to trial. A Cascade County jury, after hearing all of the evidence presented during trial, determined St. Paul did not violate Montana's UTPA. (CR 135).

ST. PAUL'S SUMMARY ARGUMENT:

I. MONTANA ALREADY HAS A STANDARD TO GUIDE THE TRIER OF FACT IN DETERMINING WHEN LIABILITY IS 'REASONABLY CLEAR':

Peterson argues the present case "squarely presents the question of what constitutes an insured's 'reasonably clear liability' under Montana's UTPA." Respectfully, St. Paul submits to the Court this matter has already been decided by both the Montana Supreme Court and by the Montana Legislature. In *Giambra v. Travelers Indem. Co. (supra.)*, this Court held liability is not reasonably clear where there exist genuine issues of material fact regarding negligence and liability. See, *Giambra,* 78 P.3d 880, ¶¶ 16-17. Likewise, the Montana Legislature has set forth the law applicable to the present case in MCA § 33-18-242(5), stating "An insurer may not be held liable (under the UTPA) … if the insurer had a reasonable basis in law or in fact for contesting the claim…" See, *MCA § 33-18-242(5).* This

Court has determined the issue of reasonableness is a matter for the jury to decide. See, *Dean v. Austin Mut. Ins. Co.* (1994), 869 P.2d 256, 258. Accordingly, the trial court did not err in refusing to grant Peterson's Motion for a Preliminary Legal Ruling or in refusing to give the jury an opening instruction that liability is reasonably clear for purposes of determining an insurer's liability under the UTPA, where liability is apportioned between the plaintiff and insured defendant on a 50/50 basis. (TR 2/17/09 hearing, pp. 15-17).

II. THE UNDERLYING OFFER OF JUDGMENT WAS NOT AN ADMISSION OF REASONABLY CLEAR LIABILITY:

Peterson's argument that the offer of judgment in the underlying personal injury action somehow amounts to an admission that liability for the underlying accident was not reasonably disputed was also properly rejected by the trial court. The ultimate determination of liability by the trier of fact has no bearing upon whether or not there exists a factual dispute regarding the issues of negligence and/or liability. See, *Giambra v. Kelsey*, 2007 MT 158, 162 P.3d 134, ¶ 20. The *Giambra v. Kelsey* decision indicates that after the Giambra matter went to trial, a jury ultimately determined the defendant, Kelsey, was 60% negligent and Giambra was 40% negligent. Thus, not unlike Peterson's argument here, upon the jury's apportionment of liability to Kelsey and Giambra, Kelsey became clearly liable for 60% of the fault for the accident. Importantly however, the jury's apportionment of negligence in *Giambra v. Kelsey* did not repudiate the fact that the trial court

and this Court had previously determined, as a matter of law, Kelsey's liability for the accident was not reasonably clear because of the underlying disputed liability facts. *Giambra v. Travelers*, ¶¶ 15-17. Clearly, the resolution of the *Peterson v. Omimex* claim, through the use of an offer of judgment (requested by Peterson) of liability had no bearing upon the issue of whether or not St. Paul had a reasonable basis in fact for contesting Lindberg's fault for the accident[11].

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO CONSIDER ALL OF THE FACTORS CONSIDERED BY ST. PAUL DURING ITS INVESTIGATION OF THE PETERSON CLAIM:

The trial court did not abuse its discretion in permitting the jury to consider all of the evidence considered by St. Paul during its initial and ongoing investigation of the underlying Peterson claim. The trial court properly considered the evidence contained in St. Paul's claim notes and determined such evidence was admissible for the purpose of the jury's consideration as to whether or not St. Paul conducted a reasonable investigation based upon all of the information available to it at the time it denied liability for Peterson's claim. (TR 2/17/09, pp. 82-84; CR 98, pp. 5-7). See, *Graf v. Continental Western Ins. Co.*, 2004 MT 105, 89 P.3d 22, ¶12. The trial court properly determined the evidence of Lindberg's alleged negligence in the underlying case was a separate and distinct issue from the issue of whether or not St. Paul violated the UTPA. (CR 98, p. 6).

[11] Based upon *Giambra v. Travelers*, Lindbergs denial of fault would have been a sufficient basis for denying liability.

IV. THE TRIAL COURT PROPERLY REFUSED PETERSON'S JURY INSTRUCTIONS:

The trial court's instructions to the jury properly instructed the jury upon the law applicable to Peterson's UTPA claims under MCA §33-18-201(4) and (6). If anything, the trial court's comparative negligence instructions, offered to the jury over St. Paul's objections, were prejudicial to St. Paul. (See, CR 131, Ins. No. 12). Under well established Montana law, a district court cannot be found to have abused its discretion in refusing to offer an instruction if the offered instructions as a whole, fairly and fully instruct the jury upon the applicable law of the case. See, *Ammondson v. Northwestern Corp.* 2009 MT 351, 220 P.3d 1, ¶ 30. Peterson was not prejudiced by the trial court's refusal of his proposed jury instructions, Nos. 37, 57, 59 and 62.

ST. PAUL's ARGUMENT:

As a preliminary matter, this Court must recognize the fact that Peterson is essentially asking it to overturn a jury verdict where the jury, after hearing all of the evidence surrounding St. Paul's investigation of the Peterson claim and Gregoire's defense of Omimex, determined St. Paul did not fail to conduct a reasonable investigation of the claim based upon all of the available information and liability for the Peterson/Lindberg accident was not reasonably clear. (CR135). Given the jury's verdict in favor of St. Paul, the present case is even more straightforward regarding the nature of the contested liability facts than those

presented to this Court in *Giambra v. Travelers,* 78 P.3d 880. Given its prior holding in *Giambra v. Travelers*[12], this Court should find agreement with the jury and recognize, as the jury did, that the Peterson claim was most certainly a claim consisting of many contested liability facts. (See for example, D's Ex. 501.5, 501.7, 501.38, 508.10, 501.57, 501.47).

This Court has long recognized the decision of the jury must be upheld except in the extra-ordinary circumstance. See, *Seltzer v. Morton*, 2007 MT 62, 154 P.3d 561, ¶ 196 (Court recognizing Montana's longstanding deference to a jury's verdict). Indeed, the Court has recognized it must exercise extreme care and:

> [T]he greatest self-restraint in interfering with the constitutionally mandated processes of jury decision, and recognize that it is the jury's function to weigh and resolve conflicts in the evidence...and to make the factual determinations necessary to render a verdict...

Seltzer, ¶¶ 93-96 (Citing, *McCleskey v. Kemp* (1987), 481 U.S. 279, 311). The policy of this Court is that it will not interfere with a jury's verdict where the verdict is supported by substantial evidence. See, *Wheeler v. City of Bozeman* (1988), 757 P.2d 345, 348.

In the present case, at the end of the five day trial, the jury, after considering all of the evidence showing the many contested liability issues in the underlying

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[12] Liability is not reasonably clear where there exist legitimate questions of fact regarding negligence and/or liability. *Giambra*, ¶¶ 15-16.

case, determined St. Paul did not act unreasonably and did not violate Montana's UTPA (CR 135). St. Paul respectfully requests that this Court uphold the jury's verdict.

I. THE TRIAL COURT DID NOT ERR IN DENYING PETERSON'S MOTION FOR PRELIMINARY LEGAL RULING:

Peterson's first issue on appeal is whether or not the trial court erred when it refused to grant his Motion for a Preliminary Legal Ruling, that 50/50 negligence amounts to liability as a matter of law. The trial court did not err in refusing to grant Peterson's motion. As mentioned above, the apportionment of negligence under MCA § 27-1-702, was both legally and factually irrelevant to the central issue of the present case, '*whether or not there were legitimate contested factual issues surrounding the Peterson/Lindberg accident*' and '*whether or not St. Paul acted reasonably in conducting its investigation of the underlying claim*'.

Montana case law has long held the issues of negligence and comparative negligence are matters for the jury to decide. See, *Solberg v. Yellowstone County* (Mont. 1983), 203 Mont. 79, 87, 659 P.2d 290, 294[13]; *Giambra v. Kelsey*,

[13] "Ordinarily it is for the jury to decide, under appropriate instructions, the issue of whether there has been a negligent breach of a legal duty. Negligence and breach of duty are for the court to determine only if the evidence is undisputed ...." *Solberg*, 659 P.2d at 294.

162 P.3d 134, ¶ 47[14].

It is undisputed there was never a finding of negligence by the trier of fact in the underlying *Peterson v. Omimex* case[15]. Moreover, the 50/50 negligence standard set forth under MCA § 27-1-702, is not the applicable standard for determining whether or not an insurer had a reasonable basis in fact or law for contesting a claim. As set forth above, the trier of fact's ultimate determination and apportionment of liability is irrelevant, or at least separate and distinct from, the determination as to whether or not there exists a legitimate dispute upon the facts giving rise to the issues of negligence and liability. *Giambra v. Kelsey*, 162 P.3d 134; Giambra v. Travelers, 78 P3d 880, ¶¶ 16; *Graf v. Continental Westrn. Ins. Co.*, 2004 MT 105, 89 P.3d 22, ¶ 12.

This Court has long recognized the issue of negligence is separate and distinct from determining whether or not an insurer has violated its duties under the UTPA. See, *Klaudt v. Flink* (1983), 658 P.2d 1065, 1067. Given the distinction, the trial court's decision to deny Peterson's motion for a preliminary legal ruling

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[14] "Montana's comparative negligence scheme set forth in §§ 27-1-702 ... requires the fact-finder to consider the negligence of the claimant, injured person, defendants, and third-party defendants ..." *Giambra*, ¶51.

[15] Apparently recognizing this shortcoming in the anticipated bad faith case, Peterson's counsel curiously requested a post mediation settlement offer be made in the form of an offer of judgment. Dep. Dale Reed, pp. 11-12 (Entered into the record at the conclusion of Reed's testimony, CR 129.20)

pursuant to the provisions of MCA §27-1-702 was correct. (TR 2/17/09 Hearing, pp. 15-18). See, *Graf v. Continental Western Ins. Co.*, 2004 MT 105, 89 P.3d 22, 25-26.

A. PETERSON'S REQUEST FOR AN OPENING INSTRUCTION ON REASONABLY CLEAR LIABILITY WAS PROPERLY DENIED:

Looking at the record of the hearing on Peterson's Motion for Preliminary Ruling, it is clear Peterson was actually seeking an opening instruction to the jury regarding 'reasonably clear liability'. (TR 2/17/09 Hearing, pp. 14-17)[16]. To the extent the trial court was correct in denying St. Paul's Motions for Summary Judgment on the issue of 'reasonably clear liability', the question of reasonableness was properly reserved for the jury. See, *Dean v. Austin Mut. Ins. Co.* (1994), 869 P.2d 256, 258. In *Dean* this Court was responding to a certified question from Montana's U.S. District Court, where the Federal Court was asking, if it could determine, as a matter of law, whether or not an insurer has a reasonable basis in law or in fact for contesting a claim, based solely upon the insureds having been charged with felony arson. This Court held, "whether the insurer had a 'reasonable basis in law or in fact' is an issue properly presented for determination to the trier of fact." *Dean*, 869 P.2d 256, 258. Pursuant to *Dean*, the trial court's refusal of Peterson's request for an opening instruction was proper and was not an

[16] Transcript 2/17/09 hearing, pp. 14-17, excerpts Attached as Exhibit D.

abuse of the Court's discretion.

B. PETERSON RECEIVED AN INSTRUCTION RE: COMPARATIVE NEGLIGENCE:

In denying Peterson's Motion for Preliminary Ruling and request for an opening modified instruction pursuant to Montana's comparative negligence statute, the Court correctly pointed out:

> *The jury in this case, which is the UTPA jury, will not be required to make a determination of comparative negligence.* ***They're looking at the reasonableness of the insurance company's actions*** *... they're not going to be making a determination of negligence.(TR 2/17/09, p. 17).*

The trial court's decision to not offer a preliminary instruction on comparative negligence was within the Court's discretion. A district court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. See, *Ammondson v. Northwestern Corp.* 2009 MT 351, 220 P.3d 1, ¶ 30. Similarly, the district court cannot be found to have abused its discretion if the offered instructions as a whole, fairly and fully instruct the jury upon the applicable law of the case. *Id.*

After initially making the correct ruling during the bad faith trial, the court, at the close of evidence, inexplicably reversed itself. Over St. Paul's objections the court gave a modified comparative negligence instruction to the jury. (TR5:949, 952, 971-972). The trial court's instructions to the jury were largely consistent with Peterson's prior request for an opening negligence instruction. Essentially the

jury was instructed that liability was reasonably clear if Peterson's negligence for the accident was not greater than Lindberg's[17].

Given the trial court's instructions to the jury, Peterson cannot legitimately argue he was prejudiced by the court's refusal to give his 'reasonably clear liability' instruction at the opening of the case. Peterson received a very similar instruction at the end of the trial. (See, CR 131, Ins. No. 12). Moreover, the given instruction was not applicable to the issue of whether or not St. Paul had a reasonable basis in fact for denying liability for the Peterson claim and should not have been given at all. (*Dean*, 869 P.2d 256, 258).

C. GREGOIRE'S AND ST. PAUL'S RISK ASSESSMENTS WERE NOT AN APPORTIONMENT OF LIABILITY:

The theme of Peterson's bad faith case was St. Paul's preliminary analysis of the accident, at potentially 50/50 liability between he and Lindberg, amounted to a final determination of the liability issue. (TR2:444-445). During the bad faith trial, Peterson accused St. Paul of 'secretly' hiding its preliminary determination of 50/50 liability. (TR1: 190). Peterson repeatedly insinuated that St. Paul's preliminary evaluation of Omimex's exposure never changed. (TR2: 484).

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[17] Jury Instruction No. 9: "liability need not be certain in order to be reasonably clear"; Jury Instruction No. 12: "**[I]n order to assist you in your determination as to whether liability was reasonably clear** you are instructed that…**negligence on the part of the plaintiff does not bar his/her recovery unless such negligence was greater than the negligence of the defendant.**" (CR131, Ins. Nos. 9 and 12).

Despite Peterson's accusations and insinuations, most of the jurors grasped the significant difference between the subjective (and evolving) liability analyses referenced in St. Paul's claim notes and the contested issues of fact which surrounded the Peterson/Lindberg accident. Allums explained the evolution of St. Paul's risk analysis to the jury as follows:

> *Q. ...During the period of time that you worked on Mr. Peterson's claim from June 21st of '04 to July 15th of '05, you determined that the insured, Michael Lindberg, was negligent in causing the accident, correct?*
>
> *A.* ***Not a final determination,*** *no, until liability was – a determination of liability analysis was not final until November, I believe, of '04. Preliminarily, after my investigation,* ***each party was claiming they were on the correct side of the road.*** *There were no independent witnesses. So,* ***basically, you just had a dispute between two parties who both seemed credible***[18]*.*

Later in his trial testimony Allums explained how and why St. Paul's risk analysis changed significantly once Dr. Lee completed his reconstruction of the accident:

> *Q. So what did you update at this point? (Re: St. Paul's 12/28/04 liability evaluation: D's Ex. 501.47)*
>
> *A. ... Montana has modified comparative statute, claimant is barred recovery if his own negligence exceeds 50 percent.* ***Claimant negligence assessed at 80 to 90 percent. This was based on the information in Dr. Lee's final opinion.***
>
> *Q. So when plaintiff's counsel was questioning you that your liability*

[18] Pursuant to the Court's holding in *Giambra v. Travelers* , ¶¶ *15-16,* the dispute between Lindberg and Peterson regarding who was on the wrong side of the road would have, in and of itself, been a sufficient factual basis for St. Paul to have denied liability for the claim.

analysis of 50/50 never changed, it did once you got Dr. Lee's report?

A. Yeah. ...the new analysis was ... 80 to 90 percent on Mr. Peterson. (TR2: 483-484)[19].

Gregoire also explained to the jury the distinction between his subjective risk assessments and why, despite his subjective belief that the jury in the personal injury case would probably be sympathetic to Peterson and award him some amount of damages, the claim always remained defensible upon the liability facts:

Q. The point is, Bill, that you were telling St. Paul in these reports that it was the negligence that was going to be adverse to Mr. Lindberg and Omimex, correct?

A. Wrong. ***I was telling them in this report that liability is not clear,*** *that the Ridley demand should be denied,* ***that we do have good defenses,*** *just to* ***look at the acts, look at the evidence ... the evidence strongly points towards Mr. Peterson being in our lane****...(TR4:917).*

...

Q. Did you still think you had a defensible case at this point?

A. ***Yes. ... from the objective evidence, no, this could be ...a complete defense verdict.*** *(TR4:890-891[20]).*

As a practical matter, nearly all contested liability cases present defense counsel, the defendant, and (where applicable) the insurer, with the potential for an adverse judgment. The mere fact a contested liability case ultimately settles does not mean the defendant or its insurer wrongly disputed the claim. See, *Madden v. ALPS (D. Mont. 2001),* 29 MFR 33. In the *Madden* case, Montana's U.S. District

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[19] See, Exhibit A.

[20] See, Exhibit B (Excerpts Gregoire Trial Testimony).

Court, Chief Judge Hon. Donald Molloy, held the following:

> The nature of litigation invests each party with the right to advocate its claim or defense within reason...**when the facts are disputed, an ultimate compromise settlement does not automatically give rise to a statutory Unfair Trade Practices claim, or to a common law bad faith claim** ... A policy that promotes a bad faith case any time there is a delay before settlement that is...at odds with Montana's legislative scheme governing settlement practices.

Madden, at 35; See also, *Giambra v. Kelsey*, 162 P.3d 134 (Jury's apportionment of the majority of fault to the defendant did not repudiate prior findings that defendant's liability for the accident was not reasonably clear).

This Court should not substitute the subjective analyses of defense counsel for the defendant's right to have the jury decide disputes regarding legitimately contested factual issues. Such a policy would not only be unfair to insurers such as St. Paul, it would also put ordinary every-day Jane and John Doe defendants at considerable financial risk and potentially violate their constitutional right to have their legitimate disputes determined by a jury. See, *Shilhanek v. D-2 Trucking, Inc.*, 2003 MT 122, 315 Mont. 519, 70 P.3d 721, ¶ 22 (insurer required to pay limits of policy without benefit of release for the insured).

If this Court changes the law in Montana and requires an insurer to settle a contested liability claim based merely upon the subjective analysis as to how the claim might ultimately be decided, instead of whether or not the liability facts are legitimately in dispute, the insured defendant will face the daunting prospect of his

insurer settling an otherwise defensible claim, in order to avoid bad faith litigation. Such a practice would leave the average Jane Doe defendant exposed to liability and defense costs which may have been avoidable if the claim were aggressively litigated and eventually compromised or successfully defended through trial. As a practical matter, post *Shilhanek*, insureds want and need their insurance companies to fight contested liability claims because they face personal exposure after the insurer pays its required limits.

Given the evidence presented to the jury during the bad faith trial, the jury correctly seized upon the difference between Gregoire's subjective reporting to St. Paul on the potential exposure it faced at the end of the underlying case and the actual contested facts regarding Lindberg's alleged fault for the accident. This Court should make the same distinction.

D. LIABILITY IS NOT REASONABLY CLEAR, WHERE THERE EXIST CONTESTED ISSUES OF NEGLIGENCE:

Peterson asked the trial court and is now asking this Court to overrule standing Montana precedent in favor of his argument that 50/50 liability amounts to reasonably clear liability as a matter of law. (Appellant's Brf., p. 21). Despite Peterson's representation that the issue of 'what constitutes reasonably clear liability' has not been decided in Montana, several Montana Courts, including this Court, have weighed in on the issue.

This Court thoroughly considered this issue in *Giambra v. Travelers (supra.), 78 P.3d 880.* In *Giambra*, a teenager, Zadkiel Giambra, was run over by a truck while sledding. The truck was driven by teenager, Nicholas Kelsey. See, *Giambra v. Travelers Indem. Co.*, ¶ 4. After the accident, the Giambras asserted a claim for advance payment of Zadkiel's medical expenses pursuant to *Ridley*, asserting Kelsey's liability for the accident was reasonably clear. The claim for advance payments was denied based upon the insured's assertions of Zadkiel's comparative negligence. The Giambras filed a declaratory judgment action where they sought a declaration that liability for the accident was 'reasonably clear'. The insurer moved for summary judgment, which was granted by the district court. On appeal, this Court reviewed the following factors in upholding the district court's summary dismissal:

> The Giambras argue that it is undisputed that, as instructed, Nicholas drove down a hill that was glare ice and gave no warning when he moved his vehicle forward...The Giambras argue that Nicholas's liability is reasonably clear ...
>
> Travelers argues that evidence exists as to Zadkiel's own negligence... Specifically Travelers contends that Zadkiel jumped on his sled and slid in front of Nicholas's vehicle after Nicholas...resumed his travel down the hill... there is some evidence that Zadkiel was attempting to beat Nicholas down the hill...Finally, Travelers concludes that ... Zadkiel was the sole cause of the accident...

Giambra, at ¶¶ 12-13. Having reviewed the above evidence this Court held:

> In *Ridley,* we held that pursuant to § § 33-18-201(6) and (13), MCA, when liability is reasonably clear, an insurer is obligated to advance

> payment of an injured third party's medical expenses... Here, **genuine issues of material fact exist** regarding negligence and liability... Nicholas's **liability is not reasonably clear...**Travelers has no obligation under *Ridley* to advance [pay] Zadkiel's medical expenses.

Giambra, at ¶¶ 15-16 (emphasis added). Based upon this Court's holding in *Giambra v. Travelers*, the jury in the bad faith trial was correct in finding that the liability facts surrounding the Peterson/Lindberg accident were legitimately disputed and liability was not reasonably clear.

II. THE OFFER OF JUDGMENT, REQUESTED BY PETERSON AS A MEANS OF SETTLING THE UNDERLYING CASE, WAS NOT AN ADMISSION OF FAULT ON THE PART OF LINDBERG:

The Montana Supreme Court has held the purpose of a Rule 68 offer of judgment is to "encourage settlement and avoid protracted litigation". See, *Weston v. Kuntz* (1981), 194 Mont. 52, 57, 635 P.2d 269, 272. The *Weston* Court's holding contemplates an offer of judgment will typically be made during the course of the litigation process and that such an offer will be utilized as a means of compromising a contested claim.

Unlike the present case, the numerous cases cited by Peterson demonstrate situations where the party making the offer of judgment, later sought to avoid the offer, in the same litigation. (Appellant's brf. pp. 25-26). Here, St. Paul is not arguing the offer of judgment extended to Peterson was unenforceable against Omimex, or that after making the offer, St. Paul (on behalf of Omimex) became liable for the $850,000.00 offer of judgment. Indeed, St. Paul paid the judgment a

short time after the offer was accepted.

St. Paul does dispute however that the offer of judgment somehow repudiates the contested liability facts surrounding the underlying Peterson/ Lindberg accident. Such an argument cannot be reconciled with this Court's holding in *Giambra v. Travelers,* where the Court determined Kelsey's liability for Giambra's injuries was not reasonably clear because of the contested negligence and liability issues and the ultimate resolution of the Giambra matter as discussed by this Court in *Giambra v. Kelsey*, where the jury ultimately apportioned the majority of the fault for the accident to the defendant. See, *Giambra v. Kelsey*, 162 P.3d 134. Peterson's argument is also at odds with this Court's decision in *Graf v. Continental Western Ins. Co.,* where this Court determined the issues in a UTPA claim are separate and distinct from the issues in the underlying claim. *Graf,* 89 P.3d 22, ¶ 12

Clearly, the trial court did not err in finding the offer of judgment, requested by Peterson and utilized by the Parties as a means of settling the underlying case, was not a repudiation of the contested liability facts surrounding the Peterson/Lindberg accident. (See, *Exhibit C, supra*[21]; TR 2/12/08 hrng., pp.7-8).

[21] Reed's deposition was filed by Peterson as part of the trial record after his testimony on the 4th day of trial.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND OR INSTRUCT THE JURY THAT GREGOIRE WAS ST. PAUL'S AGENT:

Peterson argues the trial court erred by not finding Gregoire was acting as the 'agent' of St. Paul when he conducted the defense of St. Paul's insured, Omimex, in the underlying liability case. (Appellant's brf. p. 33). Peterson has offered no evidence to support his claim Gregoire was functioning as St. Paul's agent and the uncontroverted evidence presented to the jury at trial, established Gregoire's defense of Omimex was not being controlled by St. Paul. (TR3: 680-681; TR4: 846-847[22]).

A. GREGOIRE'S UNDIVIDED LOYALTY WAS OWED TO OMIMEX:

Peterson's argument could not be more at odds with this Court's *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures* decision. *In Re Rules*, 2000 MT 110, 2 P.3d 806. In its *In Re Rules* decision, this Court unequivocally held the insured is the sole client of defense counsel. See, *In Re Rules*, ¶ 38. The Court went on to hold that defense counsel, hired by the insurance company to defend the insured, have a duty to exercise their independent judgment and to give their undivided loyalty to the insured. *In Re Rules*, ¶ 51 (emphasis added).

By definition, Gregoire cannot be the 'agent' of St. Paul if his undivided loyalty is owed to Omimex. Under Montana law, an 'agent' is defined as "one

[22] See, Exhibit B (Excerpts Gregoire Trial Testimony).

who represents another, called the principal, in dealings with third persons." MCA § 28-10-101. Accordingly, there is an 'agency' relationship between the principal and the agent, which results from the "manifestation of consent by one person to another that the other shall act on his behalf and subject to his control." See, *Weingart v. C & W Taylor Partnership* (1991), 248 Mont. 76, 80, 809 P.2d 576, 579.

Peterson's reliance upon *Federated Mutual Ins. Co. v. Anderson*, 1999 MT 288, 991 P.2d 915 and *Safeco v. Ellinghouse*, (1986), 725 P.2d 217, 225 (Appellant's brf., p. 34) for the proposition Gregoire was functioning as the agent of St. Paul is at odds with the uncontroverted evidence presented to the jury during the bad faith trial and also with Gregoire's undivided duty of loyalty, owed to Omimex, under Montana law. Additionally, the *Federated Mutual v. Anderson* decision and the *Palmer by Diacon v. Farmers Ins. Exchange* (1996), 861 P.2d 895 decision, cited by Peterson, are further distinguished from the facts of the present case because the attorney conduct at issue in those cases involved counsel hired by the insurance company to defend the insurer's interests. *See, Federated Mut. Ins. Co. v. Anderson*, ¶ 23; *In Re Rules*, ¶¶ 30-32 (Court distinguishing *Palmer* case as first party claim).

Peterson's reliance upon *Safeco v. Ellinghouse* is likewise misplaced as the basis for the *Ellinghouse* decision (the evidence that attorney Holden was under the

control of Safeco) has been abrogated by the *In Re Rules* decision and is contrary to the uncontroverted evidence presented to the jury during the bad faith trial, establishing Gregoire was in complete control of the defense of Omimex, and was operating independently from the control of St. Paul. (TR3: 680-681; TR4: 846-847); See, *Safeco Ins. Co. v. Ellinghouse* (1986), 725 P.2d 217, 225; *In Re: Rules*, ¶ 32-34.

Peterson has offered no evidence supporting his argument that Gregoire was acting on behalf of St. Paul and not Omimex. Pursuant to *In Re Rules*, Gregoire cannot operate as the 'agent' of St. Paul while undertaking the defense of the insured, Omimex. Peterson's 'agency' argument should be rejected by the Court.

B. ABSENT SOME EVIDENCE GREGOIRE'S HANDLING OF THE DEFENSE WAS FAULTY OR AMISS, ST. PAUL HAD NO AUTHORITY TO CONTROL OR SECOND-GUESS GREGOIRE'S DEFENSE:

There is no evidence from the underlying *Peterson v. Omimex* litigation, suggesting Gregoire's analysis regarding the underlying liability facts as being reasonably disputed was amiss or wrong. Nowhere is there any evidence Peterson took issue with Gregoire's defense of Omimex in the underlying case. Accordingly, this Court and Montana's U.S. District Court have held an insurer, such as St. Paul, has no authority to control and/or second guess the informed opinions of defense counsel handling the underlying claim. See, *In Re: Rules.*, ¶¶ 40-44; *Madden v. ALPS (D. Mont. 2001),* 29 MFR 33, 34-35.

Peterson's argument, 'that defense counsel be held liable under the UTPA' (Appellant brf., pp. 36-37), would have a chilling effect on the defendant's right to defend contested liability claims if adopted by the Court. How could any defense attorney ever take the risk of litigating a contested liability claim on behalf of an insured defendant if he or she could later be held liable under the UTPA for ultimately settling the claim or failing to prevail upon the liability defenses at trial?

Before this Court entertains Peterson's claim that Gregoire's handling and defense of the underlying claim was improper, it should first require Peterson to demonstrate that Gregoire's defense of Omimex was without merit. Peterson has made no such showing in the present case.

IV. THE DISTRICT COURT DID NOT ERR IN ALLOWING ST. PAUL TO PRESENT THE EVIDENCE CONTAINED IN ITS CLAIM NOTES:

The district Court did not err when it allowed St. Paul to explain to the jury the fact that Lindberg was not cited for speed and/or inattentive driving, or for allowing St. Paul to introduce evidence reported to it by attorney Gregoire, regarding the investigating officer's determination of the point of impact. (D's Ex. 501.41) The trial court also did not err in allowing Gregoire to testify about the portions of Defendant's Exhibit 569 which were not objected to by the Plaintiff. While Peterson interposed a 'reserved objection' regarding 569.2, the record indicates that only the non-objected to portions of the exhibit were discussed by Gregoire and/or shown to the jury. (TR4:865-868).

A district court has broad discretion in determining whether evidence is relevant and admissible. This Court reviews a district court's evidentiary rulings for an abuse of discretion. The test for abuse of discretion "is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. See, *Tarlton v. Kaufman*, 2008 MT 462, 199 P.3d 263, ¶ 37.

The citation issue was one of the first issues Allums considered when he began his investigation of the claim. (D's Ex. 501.60). The citation issue was important to Allums because, had the investigating officer issued a citation to Lindberg, it would have been regarded by St. Paul as a strong indication of Lindberg's fault. (TR2: 455-456). The citation issue was also relevant to the issue of Lindberg's alleged distraction. Gregoire reported to St. Paul that no citations were issued to Lindberg because both of his hands were on the steering wheel. (D's Ex. 501.38). Likewise, the investigating officer's determination of the point of impact was reported by Gregoire to St. Paul as being consistent with the findings of Dr. Lee. (D's Ex. 501.41). Finally, all of this information Peterson claims as prejudicial was reported to and considered by St. Paul more than a year and half before the U.S. District Court ruled upon its admissibility. (D's Ex. 501.2).

This Court has held that the focus of the trier of fact in a UTPA claim is upon "what the insurer knows at a particular point in time-before trial, during the

investigative settlement stage." See, *Graf,* 89 P.3d 22, ¶ 12. The trial court did not abuse its discretion when it allowed the jury to consider all of the factors considered by St. Paul during its investigation.

Peterson's reliance upon the Court's decision in *Britton* is misplaced. The *Britton* Court's precise holding regarding an insurer's reliance upon inadmissible evidence was that "[while] an insurer may utilize inadmissible facts or evidence to develop admissible evidence, it does not act reasonably if it declines payment of an insured's claim merely upon inadmissible evidence or testimony." See, *Britton v. Farmers Ins. Group* (1986) 721 P.2d 303, 316.

Unlike *Britton*, the evidence above was considered by St. Paul as part of its investigation months in advance of the court's rulings regarding admissibility. Accordingly, the Court did not abuse its discretion in allowing the jury to consider all of the factual information contained in St. Paul's claim notes.

V. THE TRIAL COURT'S JURY INSTRUCTIONS, AS WHOLE, FAIRLY INSTRUCTED THE JURY:

Peterson argues the trial court abused its discretion when it refused to give any instructions to the jury regarding Gregoire role as defense counsel in the underlying case (Appellant's brf., pp. 35, 37-39) and in refusing his Instruction Nos. 37, 57, 59, and 62. The trial court did not abuse its discretion in refusing Peterson's instructions.

A district court has broad discretion regarding the instructions it gives or refuses to give to a jury. This Court will not reverse a district court on the basis of its instructions, absent an abuse of discretion. See, *Barnes v. City of Thompson Falls,* 1999 MT 77, 979 P.2d 1275, ¶ 8; *Christofferson v. City of Great Falls*, 2003 MT 189, 74 P.3d 1021, ¶ 9. Prejudice will not be found if the jury instructions in their entirety state the applicable law of the case." See, *Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, 112 P.3d 1018, ¶ 28.

A. ALLEGED FAILURE TO INSTRUCT THE JURY UPON GREGOIRE'S ROLE AS DEFENSE COUNSEL FOR OMIMEX:

Contrary to Peterson's argument (Appellant brf., p. 35) the jury was not confused as to Gregoire's role as defense counsel in the personal injury case. Gregoire explained his role to the jury. The uncontroverted evidence established Gregoire was in complete control of the defense. (TR4: 845-847;TR3: 680-681).

The trial court does not abuse its discretion in refusing to give instructions to the jury when such instructions do not properly state the law applicable to the case, or where they are not supported by the evidence presented at trial. See, *Barnes v. City of Thompson Falls,* 1999 MT 77, 979 P.2d 1275, ¶ 8; *Christofferson v. City of Great Falls*, 2003 MT 189, 74 P.3d 1021, ¶ 9.

The body of the instructions provided to the jury by the trial court fairly and properly instructed the jury upon the law applicable to Peterson's UTPA claims. As such, no additional instructions regarding Gregoire's role as defense counsel

were required.

B. TRIAL COURT'S REFUSAL OF PETERSON'S INSTRUCTION NOS. 37, 57, 59, AND 62:

Peterson's Instruction No. 37, sought to instruct the jury Gregoire was acting as St. Paul's agent when he defended Omimex in the personal injury action. The trial court correctly found Gregoire was not acting as St. Paul's agent when he undertook the representation of Omimex. (TR 2/27/09 hearing, pp. 35-37). See, *In Re: Rules (supra.)*, 2000 MT 110, 2 P.3d 806, ¶¶ 37-39; 47. It is not an abuse of the trial court's discretion to refuse a jury instruction which does not fairly state the applicable law of the case. See, *Hunsaker,* 588 P.2d 493, 509.

Peterson's 'offer of judgment' instruction, Ins. No. 57, was also properly rejected by the trial court. Pursuant to the facts set forth above, the offer was clearly made upon Peterson's solicitation. Moreover, the offer, while resolving the contested issues in the *Peterson v. Omimex* case and committing St. Paul to pay the $850,000.00, did not operate as a repudiation of the contested liability facts from the accident. (See, *infra p. 13*)

The Court also acted within its discretion in rejecting Peterson's Instruction Nos. 59 and 62. Instruction No. 59 sought to instruct the jury that a lack of a citation was not proof of Lindberg's lack of civil negligence. Instruction No. 62 was a 'reasonable and prudent' instruction regarding Lindberg's operation of an automobile. Neither of these instructions pertained to the issue of whether or not

St. Paul's conduct violated the UTPA.

Instruction No. 62 was also properly refused because there was no evidence supporting the claim Lindberg was driving at an excessive rate of speed at the time of the accident. The trial testimony suggested Lindberg was traveling at about 45mph or less at the time of the accident and that the investigating officer would testify 45mph was a reasonable rate of speed. (D's Ex. 501.38; TR4: 882-884).

It was proper for the trial court to exclude these instructions because they were not related to the central issues of Peterson's UTPA claims under MCA §33-18-201(4) and (6) and St. Paul's defenses to the claims under MCA § 33-18-242. (See, Special Verdict Form, CR 135). See, *Hartle v. Nelson*, 2000 MT 356, 15 P.3d 484, ¶ 19; See, *Hunsaker,* 588 P.2d 493, 509 (It is not an abuse of the trial court's discretion to refuse instructions which seek to instruct the jury upon matters outside the applicable law of the case). In reviewing jury instructions, the party assigning error must, in addition to showing an abuse of the court's discretion, show prejudice in order to prevail. Prejudice will not be found if the jury instructions in their entirety state the applicable law of the case." See, *Tripp v. Jeld-Wen, Inc.* , 2005 MT 121, 112 P.3d 1018, ¶ 28.

In the present case, the Court's instructions, taken as a whole, fairly instructed the Peterson jury upon St. Paul's obligations under the UTPA. Peterson cannot claim prejudice because the instructions he sought to give were either

misstatements of the Montana law and/or were not supported by the evidence presented to the jury.

CONCLUSION:

Peterson's assertion that 50/50 negligence, amounts to reasonably clear liability as a matter of law should be rejected by this Court. The Court should find there was no finding of negligence by the trier of fact in the underlying case and the issue of Lindberg's fault was legitimately contested, both during St. Paul's investigation of the claim and throughout Gregoire's defense of Omimex during the *Peterson v. Omimex* litigation. Peterson's argument that the offer of judgment amounted to a repudiation of the contested liability facts should also be rejected. The offer of judgment was not an admission that liability was not legitimately in dispute when St. Paul denied Lindberg's liability for the accident. Peterson's argument asserting Gregoire was acting as the agent of St. Paul should be rejected as contrary to the role of defense counsel defined in this Court's *In Re Rules* decision. The Court should also find the trial court did not abuse its discretion in allowing the jury to consider all of the factual evidence considered by St. Paul and contained in the St. Paul claim notes. The Court should also find the trial court did not abuse its discretion in refusing Peterson's jury instructions. Finally, the jury's verdict, that St. Paul did not violate the UTPA, should be upheld.

STATEMENT OF APPELLEE/CROSS-APPELLANT'S ISSUES FOR REVIEW:

Appelle/Cross-Appellant, St. Paul, seeks the Court's review of the following issues:

I. Did the trial court err when it refused to grant St. Paul's Motions for Summary Judgment? The trial court's denials of St. Paul's two motions for summary judgment are reviewed *de novo*. *Gullett v. Van Dyke Construction Company* (Mont. 2005), 2005 MT 105, 111 P. 3d 220, ¶ 11.

II. Did the trial court err when it allowed expert, C. Richard Anderson, to testify upon the law? The standard of review regarding the admissibility of evidence during trial is whether or not the trial court abused its discretion. *Hulse v. State, Dept. of Justice,* 1998 MT 108, 961 P. 2d 75, ¶ 15.

III. Did the trial court err when it refused to allow St. Paul to call Dr. F. Denman Lee as a witness at trial? *Hulse,* ¶ 15 (abuse of discretion).

SUMMARY ARGUMENT:

The trial court should have granted St. Paul's motions for summary judgment, where St. Paul sought dismissal of Peterson's UTPA claims pursuant to this Court's holding in *Giambra v. Travelers Indem. Co.*, and pursuant to MCA § 33-18-242(5). Based upon the undisputed facts in the underlying case, the liability issues surrounding the underlying accident were legitimately in dispute.

The trial court abused its discretion when it allowed Peterson's expert, C. Richard Anderson, to testify upon legal conclusions. It is well settled under Montana law that an expert may not instruct the jury upon the law of the case. See, *Safeco Ins. Co. v. Ellinghouse* (1986), 725 P.2d 217, 225; See, *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, 65 P.3d 570, ¶ 28. This Court considers expert opinions regarding the law to be highly prejudicial. See, *Hart-Anderson v. Hauck* (1988), 748 P.2d 937, 943. Anderson's testimony also prejudiced St. Paul because the 'revised standards' upon which he testified were not disclosed in advance of trial.

Finally, the trial court erred when it refused to allow Dr. Lee to testify at trial. Dr. Lee's methods and conclusions were directly called into question by Peterson's counsel during the bad faith trial. Dr. Lee should have been permitted to testify in order to support the credibility of his findings.

ARGUMENT:

I. ST. PAUL'S MOTIONS FOR SUMMARY JUDGMENT:

The present case should never have gone to the jury. The trial court erred by not granting St. Paul's two motions for summary judgment, where St. Paul argued for dismissal of Peterson's UTPA claims pursuant to *Giambra v. Travelers Indemnity Co.* (*supra.*) and MCA §33-18-242(5). (CR 11; CR 57; CR 77). Despite the overwhelming and indisputable evidence regarding the contested liability facts surrounding the underlying accident, the trial court denied St. Paul's motions for

summary judgment. (CR 39; 98). Even though the issue of reasonableness is generally a question for the jury, the presence of contested liability facts was indisputable. As such, the trial court should have ruled, pursuant to *Giambra*, that liability was not reasonably clear as a matter of law. See, *Lorang v. Fortis Ins. Co., 2008 MT 252*, 192 P.3d 186, ¶ 136 (Court holding questions of fact may be determined as a matter of law where reasonable minds cannot differ).

II. EXPERT TESTIMONY OF C. RICHARD ANDERSON:

The trial court also erred during the course of the trial by allowing Peterson's expert witness, C. Richard Anderson, to testify upon legal conclusions. While an expert witness may properly testify as to an ultimate issue of fact, expert opinion that states a legal conclusion or applies the law to the facts is inadmissible. *Perdue*, 65 P.3d 570, ¶ 28. During the course of the "bad faith" litigation, St. Paul moved in limine to exclude Anderson's opinions, arguing they were improper instructions to the jury as to how they should apply the law to the facts of the case. (CR 62, 63, 82, 97). St. Paul also argued there was no foundation for Anderson's opinions regarding the standards and practices of the insurance industry. Anderson admittedly has not worked for the directly for the insurance industry but instead has made his living suing insurance companies as a Montana trial attorney. (TR2: 369).

A hearing on St. Paul's pending motion was held on February 17, 2009. Initially, the trial court initially agreed with St. Paul, finding Anderson's proffered testimony upon his 'twelve standards' was an improper invasion upon the Court's duty to instruct the jury[23]. The Court's Order precluded Anderson from providing any opinions that would improperly instruct the jury upon the law to be applied to the case. (CR 98: 2-3).

Despite the Court's prior Order, Peterson sought to introduce twelve 'revised standards' through Anderson's expert testimony during the course of the bad faith trial[24]. The 'revised standards' were not disclosed in advance of trial. (TR2: 233). Counsel for St. Paul objected to Peterson's use of the twelve 'revised standards'. (TR1: 175-179; TR2: 231-232). Inexplicably, the trial court reversed itself and allowed Anderson to improperly refer to the 'revised standards' (blown up for the jury view) as he testified during his direct examination. (TR2: 235-238). The trial court further erred when it allowed Peterson's counsel to question other witnesses upon Anderson's 'revised standards'. (TR2: 422-423).

The trial court abused its discretion when it allowed Anderson, to testify in a manner which applied the law to the facts of the case. See, *Ellinghouse* , 725 P.2d

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[23] See, Excerpt from 2/17/09, hearing (pp. 60-64), Attached as Exhibit E.

[24] See, Revised Standards, Attached as Exhibit F. These were blown up on a foam board and placed in front of the jury throughout Anderson's testimony and at other points in the trial. (TR2:320-321, 351, 362).

217, 225. All of Anderson's trial testimony regarding St. Paul's investigation and its handling of the underlying claim and the relationship of those facts to Anderson's 'revised standards' should have been deemed inadmissible by the trial court. See, *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, 65 P.3d 570, ¶ 28. Additionally, it was error for the trial court to allow Anderson to base his testimony upon the twelve 'revised standards' which were never properly disclosed to St. Paul's counsel in advance of the *Peterson v. St. Paul* trial. See, *Smith v. Butte-Silver Bow County* (1996) 916 P.2d 91, 94.

Anderson's testimony upon the law applicable to an insurer's obligations under the UTPA is considered by this Court to be highly prejudicial. See, *Hart-Anderson v. Hauck* (1988), 748 P.2d 937, 943. Although St. Paul obtained a defense verdict in the bad faith case, despite Anderson's testimony, this Court should use the present opportunity to clarify that experts in a bad faith case may not testify as to legal conclusions regarding an insurer's alleged violations of the UTPA.

III. TRIAL COURT'S REFUSAL TO ALLOW DR. LEE TO TESTIFY:

The District Court also erred when she refused to allow Dr. F. Denman Lee to testify as a fact witness during the trial. Dr. Lee was hired by St. Paul and later by Omimex defense counsel, William Gregoire, to reconstruct the underlying accident. Dr. Lee concluded Peterson caused the accident by driving

his truck nearly two feet over the imaginary center point of the road. Dr. Lee's credibility and methods were questioned numerous times by Peterson's counsel at different stages of the trial. Peterson also argued to the jury that Dr. Lee had four different conclusions regarding Peterson's position on the roadway. (TR2: 337, 360, 379). Dr. Lee should have been allowed to testify and explain how he reached his conclusions in the underlying case. The Court's refusal to allow Dr. Lee to testify was prejudicial to St. Paul.

CONCLUSION RE: CROSS-APPELLANT ISSUES:

This Court should find liability for the Peterson/Lindberg accident was not reasonably clear as a matter of law. The Court should also find that the trial court abused its discretion by allowing Peterson's expert to testify upon conclusions of law and in refusing to allow Dr. Lee to testify as a fact witness.

DATED this 15 day of January, 2010.

BROWN LAW FIRM, P.C.

BY _____

Guy W. Rogers
Matthew I. Tourtlotte
Attorneys for Appelle/Cross-Appellant
St. Paul Fire & Marine Insurance Company

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced and the word count, is 9,915 words, excluding the Certificate of Service and this Certificate of Compliance.

DATED this 15 day of January, 2010.

BROWN LAW FIRM, P.C.

BY _____

Guy W. Rogers
Matthew I. Tourtlotte
Attorneys for Appelle/Cross-Appellant St. Paul Fire & Marine Insurance Company

CERTIFICATE OF SERVICE

This does certify that a true and correct copy of the foregoing was duly served on counsel of record by U.S. mail, postage prepaid, and addressed as follows, this 15 day of January, 2010:

Alexander (Zander) Blewett
Kurt M. Jackson
HOYT & BLEWETT PLLC
P. O. Box 2807
Great Falls, MT 59403-2807

BY _____
Guy W. Rogers/Matthew I. Tourtlotte